

Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Streamlining Broadcast EEO) MM Docket No. 96-16
Rule and Policies, Vacating the EEO)
Forfeiture Policy Statement)
and Amending Section 1.80 of)
the Commission's Rules to Include)
EEO Forfeiture)

TO: The Commission

COMMENTS OF SMITHWICK & BELENDIUK, P.C.

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SUMMARY

In this rulemaking proceeding, the Commission is soliciting Comments relating to the reformation of the existing broadcast EEO rules, i.e., 47 C.F.R. §§73.2080, 73.3612.¹ However, it appears from well established legal precedent that much of 47 C.F.R. §73.2080 is in violation of the First and Fifth Amendments of the Constitution of the United States and imposes requirements precluded by the *Civil Rights Act*. Thus, it is respectfully submitted that the better solution is deletion of the unlawful portions of these rules, rather than attempting to reform them.

Legally, there is a world of difference between prohibiting discrimination and promoting affirmative action. Since discrimination *per se* is abhorrent, FCC licensees who practice discrimination thereby raise serious questions as to their character qualifications to be a licensee. 47 C.F.R. §73.2080(a) is designed to achieve that laudatory goal.

Affirmative action is a very different matter. The Supreme Court has taught us that racial discrimination by giving preferences to non-whites as against whites is as much racial discrimination as giving preferences to whites against non-whites.²

¹ See also 47 C.F.R. §0.283(4). It is to be noted that the FCC proposes no reformation of the virtually identical common carrier EEO rules, cf: e.g., 47 C.F.R. §§1.815; 21:307, and 22:307.

² *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279-280 (1976).

The FCC has acknowledged that the proper forum for adjudicating individual complaints of discrimination is either the Equal Employment Opportunity Commission ("E.E.O.C.") or the Courts. In so doing, the FCC has stated that its sole function in EEO matters is to establish the right of "protected groups" as a whole to be afforded equal opportunity in employment, rather than one of protecting individuals. The Supreme Court has recently taught us that the due process clause of the Fifth Amendment to the Constitution protects persons, not groups. Thus, unless the FCC's protection of racial groups meets the strict scrutiny test, it is unconstitutional. Under this test the FCC's EEO program can only be upheld if it serves a compelling governmental interest and is narrowly tailored to serve that interest. The FCC's EEO program cannot be upheld under these tests.

The FCC's second proposition for its goal of giving a "protected group" special employment rights, as against other applicants for the same position, is to promote "program diversity." This legal proposition also must meet the strict scrutiny test, because if it does not, then the FCC's involvement in program "content" is violative not only of the First Amendment to the Constitution, but also Section 326 of the Communications Act.

In 1968, the FCC's initial intent was the laudatory one to adopt an EEO rule, which would permit the FCC to be able to lawfully deny licenses, renewal of licenses or impose monetary forfeitures on those guilty of racial discrimination. Section 73.2080(a) standing alone achieves that goal. The FCC has made a record

finding that broadcasters as a group historically have never engaged in discriminatory practices. By 1969, the FCC greatly expanded its EEO role to one of promoting affirmative action. By 1984, the FCC summarized its current EEO policy as being such that when statistical information collected "indicates that any protected group is not being afforded equal opportunity in employment and [when] that cause is [either] a faulty EEO program or an insufficient effort to implement that program, appropriate sanctions are ordered." Processing guidelines as to the percentage of minorities in the local work force were established as data to be used by the FCC to show that the affirmative action "goal" of giving the "protected group" equal opportunity had been achieved by a licensee, so such threatened sanctions need not be imposed.

While originally establishing its broadcast EEO rules, in order to enforce the *Civil Rights Act*, the FCC subsequently announced that: "The overriding goal underlying our EEO rules is to promote program diversity." However, the FCC has never elucidated how the staff of a station has any right to control, or even materially influence, what programming the station broadcasts, or how the mere presence of members of a protected group on the station's staff has any impact on programming decisions. Thus, as a result of the FCC's EEO policy being now directly related to programming "content," a First Amendment question is raised.

The *Civil Rights Act* (42 U.S.C. §2000(e)-2(j)) precludes any federal agency from requiring an employer to grant any preferential treatment to any group based

on an imbalance between those employed as compared to the total percentage of that group in the available work place.³ It appears that all of the sections, but Section (a) of 47 C.F.R. §2080 are designed to promote affirmative action and thus they are violative of the Fifth Amendment of the Constitution of the United States.

³ As the Supreme Court held in *Steelworkers v. Weber*, 443 U.S. 193, 206 (1979): "The Section was designed to prevent §703 of Title VII from being interpreted in such a way as to lead to undo Federal Government interference with private business because of some Federal employee's ideas about racial balance or racial imbalance."

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TO: The Commission

COMMENTS OF SMITHWICK & BELENDIUK, P.C.

Smithwick & Belendiuk, P.C. ("S&B"), on behalf of certain of its broadcast clients, hereby respectfully submits Comments in the above-captioned rulemaking proceeding (the "*N.P.R.M.*").⁴ In comment thereon, it is stated as follows:

I. PRELIMINARY MATTER

Fundamental to the FCC's consideration of the Comments in the N.P.R.M. is the FCC's conclusion, set forth at ¶¶13-15 of the N.P.R.M., that the decision of the Supreme Court in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995) ("*Adarand*") is inapposite because the FCC's EEO policy is "an efforts-based approach" that does not mandate that broadcasters employ any person on the basis of race. However, where broadcasters do not employ a sufficient number of persons of a protected group, in relationship to their percentage in the local work

⁴ *Order and Notice of Proposed Rule Making*, 11 FCC Rcd 5154 (1996). ("*N.P.R.M.*").

force the FCC either imposes a fine or designates "the renewal application for hearing with a view towards denying it." See, e.g., *Northeast Kansas Broadcast Services, Inc.*, FCC 96-97, released April 5, 1996. Yet the history of the FCC's adoption of its EEO rules shows that promoting program diversity was not the predicate for the adoption of the EEO rules when first adopted in 1968, and did not become the predicate on which the Commission was ostensibly relying until 1976.⁵ Moreover, the FCC has applied almost identical rules (See n.17, *infra*) to enforce its EEO policy in regulating common carriers, which rules *per se* have nothing to do with promoting program diversity, but rather specifically were adopted to enforce the *Civil Rights Act*. Obviously, the FCC's almost identical EEO rules cannot rationally be on one hand to enforce the *Civil Rights Act* in the case of common carriers, but not to enforce the *Civil Rights Act* in the case of broadcasters. This distinction creates an obvious logical inconsistency.

To show that the reason behind the FCC's adoption of 47 C.F.R. §73.2080 was to enforce the *Civil Rights Act* in a manner which is in violation of the *Civil Rights Act*, it is important to set forth the evolution of the FCC's EEO rules.

II. THE EVOLUTION OF THE FCC'S EEO POLICY

⁵ The Court of Appeals for the D.C. Circuit has described this change of the ostensible motive for adopting a rule as: "Succumbing wholesale to the forbidden sin of *post hoc* rationalizations...." *Reuters Limited v. FCC*, 781 F.2d 946, 951 (1986).

In 1968, the FCC's EEO policy when first adopted was predicated on the fundamental principle that any broadcast licensee who engaged in racial discrimination did not have the requisite character qualification to be a licensee.⁶ Obviously, this initial adoption by the FCC of an EEO rule was the necessary predicate to the FCC's revocation of a license or imposition of a forfeiture on any licensee for discriminatory conduct.⁷ Otherwise, the FCC had no part in the EEO enforcement process. The Commission adopted its EEO rule based on its conclusion that the award of a broadcast "license under a public interest standard ... clearly parallels the Federal policy in contract awards."⁸ Three conclusions made by the Commission as to the scope of its EEO rule, are significant. First, when the rule was adopted its adoption was not based on an FCC finding that there was any past practice of discrimination by broadcasters, which the rule was specifically designed to prohibit. Therefore, the FCC's EEO rule was not meant to be "remedial" in nature.⁹ Second, the Commission concluded that it would be improper for the FCC to use its EEO rule to intervene in the licensee's "[j]udgment

⁶ *Non-Discrimination in Employment Practices*, 13 FCC 2d 766 (1968) ("*Non-Discrimination I*").

⁷ "For, while adoption of our policy in rule form would involve cease and desist procedures and forfeitures ... the matter is of such a serious nature as to call into question the basic grant of operating authority." *Non-Discrimination I* at 771.

⁸ *Non-Discrimination I* at 769. It is to be noted that the Supreme Court's decision in *Adarand* also involved the Federal policy in contract awards.

⁹ *Non-Discrimination I* at 775.

as to whether to use one performer or another or a particular script approach in a particular program is wisely beyond the jurisdiction of the Commission."¹⁰ Thus the FCC's EEO rule was not adopted in 1969 for the purpose of influencing diversity of programming, as the FCC later claimed that it was in 1976. Third, the FCC also recognized that Section 703 of the *Civil Rights Act* is pertinent because it addressed the issue of giving preferential treatment due to numerical disparity, and found that such a practice is unlawful. However, 47 C.F.R. §73.2080(3) requires precisely this unlawful practice.

"Section 703 of the *Civil Rights Act* [42 U.S.C. §2000(j)] is also pertinent to our consideration of the pending rule making petition. It provides, in part, that an employer is not required to give preferential treatment on account of race, color, religion, sex or national origin of an individual or group because of a disparity between the percentage of such persons on his employment rolls and the total number or percentage of such persons ... in the available work force in any community."¹¹

By 1969, the FCC's EEO policy had evolved from one of adopting rules which would permit it to impose sanctions on its regulatees who were found to have actually discriminated to one of "affirmative action." Originally, the expressed predicate of the Commission's action in adopting its EEO rule was to "complement, not conflict with, action by bodies specially created to enforce the policy...."¹² The

¹⁰ *Ibid.*

¹¹ *Non-Discrimination I* at 767.

¹² *Nondiscrimination in Broadcast Employment*, 18 FCC 2d 240 (1969)(*Non-Discrimination II*).

Commission therein also noted that the consideration of applications should not be held up because of inconsequential complaints.¹³ The Commission proposed adopting a program requiring “the submission by licensees of more detailed equal opportunity programs as to significant minority groups (Negroes, Orientals, American Indians and Spanish-surnamed Americans) which may be most in need of assistance in achieving equal employment.... [The EEO reports] should be most useful to know how the specific practices proposed in the [FCC's prescribed¹⁴] station's equal employment opportunity program have been correctly applied and what effect they have had upon ... the status of minority group members.”¹⁵ The Commission therein stated its express purpose was one of collecting statistical data, not of mandating affirmative action. The Commission did not indicate therein that its intention in gathering this statistical information was for use in reviewing renewal applications for affirmative action purposes.

In 1970, the Commission adopted the rule requiring the filing of annual statistical EEO reports. Therein, the FCC also required that these reports include data on the gender of employees “in light of the inclusion of this category in the *Civil Rights Act of 1964*, Title VII, and the national policy of insuring equal

¹³ *Id.* at 241.

¹⁴ See FCC Form 396.

¹⁵ *Non-Discrimination II* at 244. (underscoring supplied).

employment rights to women."¹⁶ Thus, up to this time, it consistently was enforcement of the *Civil Rights Act* and not diversification of programming that was the FCC's stated purpose of seeking employment information and reviewing the filing of annual EEO statistical reports.

In 1970, the FCC also adopted almost identical rules requiring that common carriers should also file EEO annual statistical reports.¹⁷ Therein the FCC stated: "Our rules are based on the national policy of eliminating discrimination in employment practices as set forth in Title VII of the *Civil Rights Act*. That Act does not deal with discrimination on the basis of age. We have limited our rules to those matters covered by the *Civil Rights Act*."¹⁸ Therein, the Commission went on to say:

"Action by the Commission will complement, rather than conflict with any action by other agencies specially created to enforce the policy of equality in employment....

Our annual employment reports are designed to be subdivided into computerized data which can then be programmed for retrieval, to provide a variety of 'profile' statistics regarding utilization of

¹⁶ *Nondiscrimination in Broadcast Employment*, 23 FCC 2d 430, 431 (1970) ("*Non-Discrimination III*").

¹⁷ *Equal Employment Opportunities - Common Carriers*, 24 FCC 2d 725 (1970) ("*EEO-Common Carriers*"). Compare FCC Form 395-B (Broadcasting) with FCC Form 395 (Common Carrier).

¹⁸ *EEO-Common Carriers* at 726, n.2.

minority groups and female employees within each company or the industry as a whole.”¹⁹

Thus, prior to 1976 the entire thrust of the FCC's EEO policy was consistently to enforce the *Civil Rights Act* by ensuring that no FCC licensee, whether it be a broadcaster or a common carrier, violated the *Civil Rights Act* without risk of sanctions - i.e., a monetary forfeiture or loss of license. Up until 1976, diversity of programming was never once mentioned by the FCC as its motive for the adoption of its EEO rules.

If diversity of programming, rather than enforcement of the *Civil Rights Act*, was the motive behind the FCC's EEO policy, then that policy would not have been made applicable to common carriers, that obviously are not involved in programming. Even the government's right to be involved in broadcasters' programming decisions is very limited.²⁰ However, in applying the same policy to common carriers that it does to broadcast licensees, the Commission candidly admitted its purpose in adopting the common carrier EEO reporting rules was enforcing the *Civil Rights Act*.

In 1976, the entire thrust of the FCC's EEO policy changed from one of imposing sanctions on those guilty of discrimination to that of **requiring**

¹⁹ *Id.* at 727.

²⁰ See, *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

affirmative action in a licensee's staff hiring policy.²¹ Without mentioning the fact that it had adopted EEO rules applicable to common carriers designed to enforce the *Civil Rights Act*, the FCC cosmetically changed its express goal for its similar broadcast rules to one of ensuring that its licensees' programming fairly reflects the tastes and viewpoints of minority groups, citing as the brand new basis for its *post hoc* rationalization (See n.1, *supra*) the Supreme Court's *dicta* in *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1975) ("*FPC*").²²

In 1976 the FCC announced that it "did not intend to intimidate licensees into thinking that any disparity between minority and female employees and their representation in the licensee's community of license would automatically trigger a Commission EEO inquiry or otherwise jeopardize a licensee's license renewal."²³ Nonetheless, by 1984, the FCC announced it intended the annual EEO statistical report filing for an affirmative action purpose that seems to veer very close to intimidation:

"5. Section 73.2080 of the Commission's rules requires broadcast licensees to refrain from employment discrimination and to establish

²¹ *Nondiscrimination in Employment Policies and Practices*, 60 FCC 2d 226 (1976) ("*Non-Discrimination IV*").

²² Except for the minimum number of employees (5 vs. 16) that applied to common carrier EEO filings (FCC Form 395), FCC Form 395A requires the submission of virtually identical information. Compare the EEO reporting requirements in 47 C.F.R. §73.3612 (broadcast) using FCC form 395A with the EEO reporting requirements in 47 C.F.R. §1.815 (common carrier).

²³ *Non-Discrimination IV* at 237-238. (underscoring supplied).

an EEO program which results in positive and continuing efforts to recruit, employ, and promote all qualified persons without regard to race, color, religion, national origin or sex. Section 73.3612 requires stations to file an Annual Employment Report, which contains information designed to guide the licensee, the Commission, and the public in assessing the results of the licensee's EEO program. In evaluating a licensee's compliance, the Commission first compares a station's employment profile to the available labor force. ... [i]f that comparison reveals that the percentage of women or minorities on the station's staff is less than the applicable processing guidelines,^{4/} the station's EEO program, Annual Employment Reports, and any other relevant and material information concerning its employment practices are analyzed. When the information available indicates that the licensee is complying with our EEO rule and policies, any pending application is granted, if otherwise appropriate. On the other hand, when that information indicates that any protected group is not being afforded equal opportunities in employment and that the cause is a faulty EEO program or an insufficient effort to implement that program, appropriate sanctions are ordered. Further, when the cause of an unreasonably low female or minority presence cannot be determined or when it appears that a violation of our EEO rule may have occurred, an inquiry or investigation is conducted. Finally, if we find that a substantial and material question of fact exists, we designate the application for an evidentiary hearing. As the foregoing demonstrates, the determinative factors in our evaluation of a station's employment practices are not merely the station's employment statistics but the thoroughness of its EEO program and the good faith efforts undertaken to make that program work.²⁴

^{4/} By Public Notice No. 14932, dated March 10, 1977, the Commission established processing criteria for the routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose female or minority employment did not reflect at least 50% of their percentage in the available labor force overall

²⁴ *Equal Employment Violations*, 56 RR 2d 445, 446-447 (1984). (underscoring supplied).

and 25% in the upper-four job categories. By Public Notice, FCC 80-61, dated February 13, 1980, 46 RR 2d 1693 (1980), these processing guidelines were extended to stations with 5 or 10 full-time employees. Further, the Commission revised the processing guidelines for the upper-four job categories to 50% for stations with 11 or more full-time employees.

Thus, the FCC adopted a reporting requirement apparently designed to produce the very situation that §703(j) of Title VII was meant to preclude, see *supra*, n.3.

III. **THE AFFIRMATIVE ACTION ASPECTS OF THE FCC'S EEO RULES ARE VIOLATIVE OF THE FIRST AND FIFTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AND THE CIVIL RIGHTS ACT**

A. **"The Fifth and Fourteenth Amendments to the Constitution Protect Persons, not Groups."²⁵**

In adopting in 1968 part (a) of 47 C.F.R. §73.2080, the FCC established a rule protecting persons against discrimination. In 1978, the FCC entered into a Memorandum of Understanding with the Equal Employment Opportunity Commission, agreeing as follows:

4. In addition, the agencies agreed that the FCC would become "an agent of the EEOC" for the "sole purpose" of receiving charges of employment discrimination. The date of filing with the FCC, then, would be deemed to be the date of filing with the EEOC. To effectuate this, the FCC agreed that when it gets a "charge" which comes within its and the EEOC's jurisdiction, it would forward the complaint to the EEOC. Further, if the EEOC received a charge which fell without its jurisdiction but within the FCC's jurisdiction, it would refer the matter to the FCC "which will process the complaint

²⁵ *Adarand* at 2112.

in accordance with its own rules, policies and procedures." And if the EEOC got a complaint which fell within both its jurisdiction and the FCC's, the EEOC would "process the charge in accordance with its normal procedures." Also, the EEOC promised to send the FCC "quarterly reports to keep the FCC informed of charges against broadcasters." ²⁶

If the FCC's EEO policy had remained one of applying sanctions to those applicants or licensees found to have actually discriminated in their employment practices, the undersigned's clients would applaud that policy. But the FCC's EEO policy has evolved to one of affirmative action. The FCC has expressed concern that the effect of using the EEO statistical data filed by broadcast licensees to compare with work force availabilities could intimidate licensees.²⁷ However, while the FCC has insisted that its EEO policies are a "goal," not a quota, it clearly is a goal that results in sanctions if not achieved.²⁸ This is no more a goal to be achieved than to say it is a driver's goal not to go through a red light. However, the driver risks loss of his or her license if he or she does not achieve that goal. That is very different from a goal in the true meaning of the word, i.e., the end towards which effort is directed, e.g., to raise \$X for the United Way Campaign. There are no sanctions for failing to meet a true goal. Such a goal is merely a desirable public purpose which voluntarily is to be reached. *Adarand* has been

²⁶ *FCC & EEOC, Memo of Understanding*, 70 FCC 2d 2320, 2321 (1978).

²⁷ See, *supra* n. 19.

²⁸ *Ibid.*

described by the Attorney General as requiring strict scrutiny review where the federal government adopts any classifications that make race or ethnicity a basis for decision making.²⁹

The FCC has stated that with the strict scrutiny standard applicable, its EEO policies would be upheld only if they serve a compelling governmental interest and are narrowly-tailored to serve that interest.³⁰

The FCC's goal in initially adopting its EEO rules was not remedial in nature; the FCC found that there was never any past practice of discrimination by broadcasters. *Non-Discrimination I* at 775. Moreover, the FCC's policy is one which is generally applicable to "protected groups" (See *supra* n.20). In *Adarand*, the Court taught us:

²⁹ "Although *Adarand* involved government contracting, it is clear from the Supreme Court's decision that the strict scrutiny standard of review applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking.^{2/} Thus, the impact of the decision is not confined to contracting, but will reach race-based affirmative action in health and education programs, and in federal employment. Furthermore, *Adarand* was not a "quota" case: its standards will apply to any classification that makes race or ethnicity a basis for decisionmaking." *U.S. Department of Justice, Memorandum to General Counsels*, released June 28, 1995, p. 7.

^{2/} By voluntary affirmative action, we mean racial or ethnic classifications that the federal government adopts on its own initiative, through legislation, regulations, or internal agency procedures. . . .

³⁰ "*FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy*," FCC 95-391, Released September 15, 1995.

"The three propositions undermined by *Metro Broadcasting*, all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race - a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' ... should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. ... Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental action, must be analyzed by a reviewing court under strict scrutiny... to the extent that *Metro Broadcasting* is inconsistent with that holding is overruled.³¹

Thus, under *Adarand*, the FCC's initial EEO program, which applied in cases involving persons, was constitutional, but the current affirmative action policy that evolved from it, which applies to "protected groups," is not constitutional, unless it meets the strict scrutiny test.

The FCC's EEO program cannot meet the strict scrutiny test because it is not race neutral. It, instead, is designed to encourage broadcasters to hire members of one of the "protected groups," as against non-members.³² The policy has been a component of FCC regulation for almost three decades and yet the FCC has never

³¹ *Adarand* at 2112-2113.

³² Racial discrimination by giving preferences to non-whites as against whites is as much racial discrimination as giving preferences to whites as against non-whites. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279-280 (1976).

conducted a single empirical study³³ to determine whether the EEO policy has produced any positive result.

B. **The FCC's assertion that its EEO program is designed to produce program diversity is not supported by any factual evidence.**

As noted *supra*, the first time the FCC referred to program diversity as being its EEO goal was in 1976 when the Supreme Court raised the point as *dicta* in *NAACP v. FPC*, 925 U.S. 662, 670 n.7 (1976). Prior to 1976, in adopting its EEO rules applicable to broadcasters and in its promulgation of the EEO rules applicable to common carriers, the Commission's stated goal was enforcement of the *Civil Rights Act*.

Because of scarcity of spectrum, the FCC has the power to require that a broadcaster supply programming that meets the needs and interests of its listening public. *Red Lion Broadcasting Co. v FCC*, 395 U.S. 367 (1969). However, this power is extremely limited, *FCC v League of Women Voters of California*, 468 U.S. 364, 378 (1984). In initially adopting its EEO rules, the FCC specifically claimed that the rules were not intended to have any impact on programming which "is wisely beyond the jurisdiction of the Commission."³⁴ It was not until the Supreme Court's 1976 *FPC* decision that program diversity, rather than *Civil Rights*

³³ *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) ("*Bechtel*") (The Commission cannot forever conclude its policies are achieving a public interest goal without eventually having empirical evidence to support that conclusion.)

³⁴ *Non-Discrimination I* at 775.

Act enforcement, became the rationale behind justification of the FCC's EEO rules, which had been adopted almost a decade before.

The FCC has cited the Supreme Court's decision in *Metro Broadcasting, Inc. v FCC*, 497 U.S. 547 (1990) ("*Metro*") as supportive of the diversity justification. However, even if *Metro* had not specifically been overruled (*Adarand* at 2113) it still would be inapposite to the diversity issue. *Metro* involved the issue of minority ownership vs. comparative hearing "integration" credit.³⁵ The FCC's EEO rules do not relate to ownership, but rather station staff. Absentee owners are common. However, even in the case of a station operated by absentee owners or in the case of a local marketing arrangement, it is the owners and they alone who control programming decisions and not the station's staff. Indeed, Section 310 of the Communications Act precludes anyone but owners from having input into a station's programming. Thus, requiring that a station's staff have some relationship to the percentage of minorities in the local work force has absolutely no relationship to programming. To argue otherwise would be a classic case of racial stereotyping, particularly in the case of AM and FM stations. In such a case the FCC would be asserting that the public would know by the station personality's voice that he or she is a member of a specific minority group.

³⁵ The "Integration" factor has been found to be arbitrary and capricious. *Bechtel*.

The FCC has always held that the failure of a broadcaster to serve the needs of sizeable minority groups in its area was a sufficient ground for nonrenewal of a license, *Chapman Radio and Television Co.*, 24 FCC 2d 282, 286 (1970). However, the FCC has for the last decade consistently found that there are so many outlets of media that such diversity is no longer of any concern. In 1981, the FCC eliminated its formal ascertainment of community needs guidelines. See, *Deregulation of Radio*, 84 FCC 2d 968, 975 (1981). In 1985, the FCC eliminated the "Fairness Doctrine" because of the abundance of media, *Report Concerning the General Fairness Obligation of Broadcast Licensees*, 102 FCC 2d 143 (1985). In 1992, holding that:

"When coupled with the numerous media outlets now available to local listeners . . . the local marketplace is far more competitive and diverse...."³⁶

In response to the *Telecommunications Act of 1996*, the FCC has greatly expanded the number of stations a single license may control not only throughout the United States, but in a single market. Thus, it appears that diversity of viewpoint has become so prolific with AM, FM, TV broadcast stations, satellite to home, cable TV, Internet, etc., that diversity is no longer a goal to be achieved, but rather a goal that has been achieved.

³⁶ *Radio Multiple Ownership Rules*, 7 FCC Rcd 2755, 2773-2774 (1992).

Thus, even assuming *arguendo* there were any relationship between the ethnic composition of a station's staff and the local minority population, that would not justify the FCC's involvement in programming in order to secure the goal of diversity, because that goal has long since been achieved.

C. **If the purpose of the FCC's EEO policy is to have an input into programming decisions, a question arises as to potential violation of the First Amendment.**

The FCC has imposed certain affirmative obligations on broadcasters to serve their communities. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). However, the FCC is precluded by both the First Amendment of the Constitution and Section 326 of the Communications Act from being involved in program content decisions. As Justice O'Connor noted in her dissent in *Metro*:

“It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character ... And the same is true of the interest in diversity of viewpoint.” *Metro* at 612-613.

Nowhere in any order by which the FCC has related program diversity to its EEO rules, or the makeup of a station's non-ownership staff to programming has it explained the basis for such a conclusion. If the rule is true that only owners may select program content, then it follows there should be no relationship between staff and programming no matter what the racial or gender makeup of the staff.

Thus in the absence of a mere unsupported conclusion that somehow a diverse staff results in diversity of programming and nothing more, a serious

question is raised as to whether the FCC is using its EEO rules to involve itself in program content. If it is doing so, as it says it is, then such involvement is in violation of the First Amendment.

D. **An issue arises as to whether the FCC's EEO rules are in violation of the Civil Rights Act.**

Title VII of the *Civil Rights Act* (42 U.S.C. §2000(e)-2(j)) states in pertinent part:

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color religion, sex, or national origin employed by any employer, ...in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area or in the available work force in any community, state, section, or other area."

It has been held "[T]hat Title VII does not impose on an employer the duty to favor a minority, discriminated against in the past, in order to correct pre-Act racial imbalances." *E.E.O.C. v. Navajo Refining Co.*, 593 F.2d 988, 991 (10th Cir. 1979). "Title VII prohibits him [the employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-578 (1978). The Section

was designed to prevent §703 of Title VII from being interpreted in such a way as to lead to under 'Federal Government interference with private businesses because of some Federal employees' ideas about racial balance or racial imbalance."³⁷ The FCC recognizes this to be the law. *Non-Discrimination I* at 767.

It therefore appears that, in adopting its EEO policy employing the use of statistical comparisons as a basis for imposing sanctions on licensees, the FCC imposed a requirement that is in contravention of Title VII of the *Civil Rights Act*.

V. CONCLUSION

The FCC initially adopted an EEO policy which protected persons by making an act of discrimination the basis for sanctions against the discriminating licensee (See, 47 C.F.R. §73.2080(a)). That policy is both lawful and praiseworthy. The FCC's EEO policy has since evolved to encourage affirmative action with the imposition of sanctions if the ratio of a minority "protected group" does not correspond to their percentage in the local work force. Under the strict scrutiny test such a policy is in violation of the equal protection clause of the Fifth Amendment. There is no correlation between the makeup of a station's employees and its programming, so programming diversity cannot be the logical predicate of the EEO rules. When the FCC applied virtually identical rules to common carriers,

³⁷ *Steelworkers v. Weber*, 443 U.S. 193, 206 (1979).